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In The

Supreme Court of the United States

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,
XAVIER AGUILAR, DAVE DESPOT,
MARK DARLING & MARK REPCIK,
Petitioners,

v.

CENTER FOR BIOETHICAL REFORM,
PAUL KULAS & THOMAS PADBERG,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Here, the power given to schools to protect the sanctity of the school environment clashes with the ban on the heckler's veto. In a published decision, the Ninth Circuit Court of Appeals has limited government's right to protect the school environment by holding that speech in and around schools can only be limited if the **manner** in which the speech is conveyed is disruptive ---- and not if the content of the speech itself causes a substantial disruption to the school environment. This ruling conflicts with relevant Supreme Court precedent, and presents the following important federal questions:

1) Can school and law enforcement officials restrict speech that causes a substantial disturbance at a school even if the manner in which the speech is presented is not in and of itself disruptive?

2) Is there an exception for schools with regard to the ban on the heckler's veto?

3) Did sheriff's deputies violate the First Amendment by instructing anti-abortion protestors with large, graphic photographs of aborted fetuses to leave the perimeter of a middle school when their presence created a substantial disruption?

4) Where an appellate court, such as the Ninth Circuit, admits that the application of a law to a particular circumstance is unclear, does qualified immunity shield police officers from liability for the length of the detention while the officers investigate the application of the unclear law?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceeding below are Petitioners (Defendants and Appellees below), Los Angeles County Sheriff's Department, Xavier Aguilar, Mark Darling, John Despot, and Mark Repcik, and Respondents (Plaintiffs and Appellants below) Center for Bio-Ethical Reform, Mark Kulas, and Thomas Padberg.

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CITATIONS FOR OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 533 F.3d 780 (9th Cir. 2008), and is reprinted at 1a-38a. The decision of the district court granting the Petitioners' motion for summary judgment was not reported, and is reprinted at 39a-54a.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit Court of Appeals filed its opinion on July 2, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Respondents pursuant to 42 U.S.C. § 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

The Respondents allege that the Petitioners violated their civil rights by applying California Penal Code § 626.8 in violation of their First, Fourth and Fourteenth Amendments to the United States Constitution. The relevant parts of these statutes read as follows:

First Amendment:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched and the persons or things to be seized.

Fourteenth Amendment (Section 1):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

California Penal Code § 626.8, Disruptive Presence at Schools ...

(a) Any person who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities, is guilty of a misdemeanor if he or she does any of the following:

(1) Remains there after being asked to leave by the chief administrative official of that school or his or her designated representative, or by a ... sheriff or deputy sheriff.

(2) Reenters or comes upon that place within seven days of being asked to leave by a person specified in paragraph (1).

(3) Has otherwise established a continued pattern of unauthorized entry.

This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Dodson Middle School is located in Rancho Palos Verdes, California and serves approximately 2000 students. App. 5a, 6a. These students are generally between the ages of 11 and 13 – grades 6 through 8. App. 44a. The school is surrounded on all sides by streets. App. 6a. For the most part, the only thing that divides the streets and the school is a chain-link fence. AER[1] 2, 30, 149, 165-169. Many of the school's classrooms have windows which view the sidewalk and public streets without any intermediary. AER 2, 149, 165-169.

Plaintiffs and Respondents Paul Kulas and Thomas Padberg are an employee and a volunteer, respectively, for Plaintiff and Respondent Center for Bioethical Reform ("CBR"). App. 5a. CBR is a social reform organization who seeks to educate the public on the reality of abortion through displays of photographs of early-term aborted fetuses. App. 4a. CBR believes that a student who is old enough to have an abortion is "old enough to see one." App. 60a.

On March 24, 2003, beginning at around 7:30 a.m., Kulas drove a large box-style truck around Dodson Middle School. App. 5a, 6a, 73a-75a. Displayed on the side of the CBR truck were large, graphic images of

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[1] These exhibits were included in the Ninth Circuit record as part of the LASD Appellees' Excerpts of Record ("AER"). The original excerpts of record submitted by the CBR Plaintiffs are listed as "ER."

first-term aborted fetuses. App. 3a, 73a-75a. Padberg drove an escort security vehicle, a white Ford Crown Victoria sedan. App. 6a. Plaintiffs repeatedly drove around and around the School, and admit that they chose the 7:30 a.m. time frame to ensure the greatest exposure to the children. App. 40a.

The presence of the truck caused what one assistant principal called an "enormous" disruption at Dodson Middle School. Children typically arrive to school between 7:15 a.m. and 8:00 a.m. App. 6a. Classes at Dodson start at 8:01 a.m. App. 7a. In this case, some students would not go to their classrooms for school because they were so focused on the truck. App. 6a, 43a. Some children were upset and crying in response to the photographs and several boys became so outraged that they indicated they were going to get rocks from a construction area near the school to throw at the truck. App. 6a, 7a, 43a. Once in class, at least one class was forced to divert from their regular curriculum to spend time calming students and discussing Plaintiffs' presence. App. 7a. In fact, up to five children left school on that day because they were too upset to remain. App. 43a.

The reaction by the children at Dodson was not atypical. CBR's Executive Director acknowledged that he has seen students faint, become physically ill, weep, avert their gaze, leave the room, and stare in disbelief in response to the photographs of the aborted fetuses. App. 5a.

The CBR vehicles also caused traffic and safety concerns. App. 6a. A school official indicated that people were so focused on the CBR vehicles that

drivers were not paying attention to the streets which were full of children walking to class, and children were likewise not paying attention to the cars. AER 5, 151, 157-158. Assistant Principal Art Roberts[2] feared that an accident might ensue because both drivers and children were distracted. AER 6, 151. Roberts testified that during his tenure at Dodson, several students had been struck and two even killed by vehicles driving on the perimeter street. App. 6a.

A school official called Defendant Los Angeles County Sheriff's Department ("LASD") for assistance. App. 7a. The official stated that a large truck with graphic pictures was circling and videotaping Dodson Middle School and disrupting the school. App. 7a.

Defendants and Petitioners LASD Deputies Mark Darling and Mark Repcik responded to the call and drove to the School where they observed the CBR truck and the accompanying security vehicle. App. 7a. The deputies observed that the Crown Victoria sedan driven by Plaintiff Padberg looked very similar to a police vehicle in potential violation of California's Vehicle Code. AER 7, 108, App. 6a. The CBR security vehicle had outside spotlights, a push bar on the front bumper, an antenna mounted on the roof, red and amber flashing lights, a security cage separating the rear seat, and a video camera mounted on the dashboard. AER 7, 60, 72-73, 83; App. 6a. One of the Plaintiffs admitted that the accompanying Crown

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[2] Co-Defendant Art Roberts has also filed a Petition for Writ of Certiorari in this matter.

Victoria was intended to create the impression that the truck had an official escort. AER 7, 108-109.

At approximately 8:05 a.m., Deputies Darling and Repcik stopped the CBR vehicles, which were still circling the perimeter street. App. 7a. The deputies told Plaintiffs that their vehicles were "scaring the kids," and that they were causing a disturbance at the school. AER 8, 35, 36, 52, 117, 126; App. 7a.

This was a unique situation which the deputies had never before confronted. App. 8a. As such, the deputies sought the assistance of their supervisor. App. 8a. They asked Defendant and Petitioner Sergeant Xavier Aguilar, the Field and Watch Sergeant on March 24, 2003, to respond to the scene. App. 7a, 8a. Sgt. Aguilar arrived about 30 minutes after the Plaintiffs were initially pulled over. App. 7a-8a.

While they were waiting for the sergeant, Kulas was free to walk around the general area, to talk to Padberg, to obtain a notepad and take notes, and to call his boss. AER 9, 37, 38, 40; App. 7a. Padberg freely sat on a retaining wall near the sidewalk. AER 10, 65-66; App. 7a. At no point did any deputy ever draw their gun. App. 7a. At no point were either Kulas or Padberg handcuffed. App. 7a. At no point were the Plaintiffs told that they were under arrest, nor were they ever placed in a patrol car. AER 10, 36, 64.

Defendant and Petitioner Deputy Dave Despot also responded to the scene. App. 8a. Deputy Despot is the school deputy for the Lomita Sheriff's Station and serves as the liaison between the LASD and Dodson Middle School. AER 11, 142-143; App. 8a. Despot

arrived about 15 minutes after Sgt. Aguilar. App. 8a. As part of the investigation, Sgt. Aguilar asked Deputy Despot to go to the school and contact the caller to clarify the situation. AER 11, 136.

Despot went to the school and asked Roberts to come to the scene to explain the situation and the disturbance created at the school. AER 11, 145; App. 8a. Kulas recalls that Roberts arrived approximately one hour after the initial stop. AER 12, 45. Roberts explained to Plaintiffs that their presence was disruptive to the school and its students. App. 40a. Plaintiffs were read and advised of California Penal Code § 626.8, pertaining to disrupting a school. App. 40a. Plaintiffs were then instructed to leave the school area, and not to return with the trucks causing the disturbance. AER 12, 44-47, 71, 102; App. 8a. Plaintiffs left the school area without incident. App. 40a.

The video on the CBR security vehicle shows that Plaintiffs were stopped at approximately 8:05 a.m., and left at approximately 9:20 a.m. App. 7a, 8a. They were detained for approximately 75 minutes. App. 7a, 8a.

Before the March 24, 2003 incident, Plaintiff Kulas had personally been to 50 schools in Los Angeles and Orange Counties as part of CBR's educational program. AER 14, 28-29. While Plaintiffs were told not to return to Dodson with the trucks, Plaintiffs were never told that they could not go to any school with the CBR trucks. AER 12, 14, 44-47; 49, 71, 102.) Plaintiffs were also never told that they would be cited with Penal Code § 626.8 if they ever went to another school. AER 14, 49.

In fact, on March 25, 2003, Plaintiff Kulas went to two or possibly three high schools in Burbank and Long Beach, California with the CBR trucks. AER 14, 47-48. Kulas had no contact with the LASD following the March 24, 2003 incident. AER 14, 50.

II. PROCEDURAL HISTORY

Plaintiffs filed suit in the United States District Court, Central District of California under 42 U.S.C. § 1983 alleging a violation of their First and Fourth Amendment rights. App. 55a-75a. Plaintiffs sued the LASD, Sheriff Leroy Baca, Sgt. Aguilar, Deputy Darling, Deputy Repcik, Deputy Despot, and Art Roberts. App. 55a. Plaintiffs also sought injunctive relief. App. 57a.

All Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b). App. 40a. The district court held that the deputy defendants were entitled to qualified immunity, and dismissed the deputies and Sheriff Baca (who was sued only in his official capacity) as redundant of the LASD. App. 41a. The district court also denied Plaintiffs' request for a preliminary injunction. App. 41a. Plaintiffs appealed the ruling on the preliminary injunction, which was affirmed by the Ninth Circuit. App. 41a.

Following discovery, all parties moved for summary judgment. The court granted summary judgment to both the LASD Defendants and to Roberts. App. 39a-54a. The district court held that there had been no violation of the Plaintiffs' First Amendment rights as the Plaintiffs were in violation of California Penal Code § 626.8 by causing a substantial disruption at the

school in violation of California Education Code §§ 44811 and 32210. App. 42a-44a. The district court also found that there had been no violation of the Plaintiffs' Fourth Amendment rights as the stop had been justified by reasonable suspicion created by the 911 call made by the school. App. 49a. The district court also found that the length of the detention was reasonable as a matter of law as the deputies took reasonable action in a minimally intrusive manner. App. 49a-50a.

Plaintiffs appealed to the Ninth Circuit. App. 9a. In a published decision, the Ninth Circuit affirmed in part and reversed in part. App. 4a. The Ninth Circuit held that the deputies had violated the Plaintiffs' First Amendment rights because they restricted Plaintiffs' speech solely because of the children's reaction. App. 16a, 25a. Applying the law banning the heckler's veto, the court held that there is "no precedent for a minors' exception to the prohibition on banning speech because of listeners' reaction to its content." App. 17a. Thus, the Ninth Circuit held that under California's school disruption statute, Penal Code § 626.8, speech can only be limited at schools when the disruption is caused by the **manner** of the speech. App. 24a.

The court did admit that there was no case law on the issue, and that the application of California Penal Code § 626.8 in this instance was not clearly established. App. 26a-27a. As such, the court agreed that the deputies were entitled to qualified immunity as to the First Amendment claims. App. 27a.

The Ninth Circuit found, however, that the deputies were liable under the Fourth Amendment.

App. 28a. Despite the court's admission that there was no case law on the issue, and that the application of Penal Code § 626.8 was uncertain in this circumstance, the court found that the deputies had violated the Fourth Amendment by way of an unreasonably lengthy detention. App. 28a. The Ninth Circuit found that the deputies' request that their supervisor and the school administrator come to the scene to assist them with their investigation unreasonably delayed the stop in violation of the Fourth Amendment. App. 31a. The court also denied the deputies qualified immunity and held that even though this was a "novel" situation, the deputies purported lack of knowledge regarding the law was not sufficient excuse for the delay. App. 18a, 36a.

The court also remanded the case for consideration of the propriety of Plaintiffs' claim for injunctive relief, and for trial on Plaintiffs' claims for conspiracy and an unlawful search. App. 38a.

REASONS FOR GRANTING CERTIORARI

In *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969) and *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972), this Court established that the First Amendment applies differently at schools and that government may restrict speech that substantially interferes with school order. Schools also may consider the maturity, age, and reaction of the youth audience in determining the content of speech that is appropriate for its students and the school environment. *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

On the other hand, this Court has also stated that speech generally cannot be restricted solely because listeners have a negative reaction ("the heckler's veto"). *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). A listener's reaction to speech is generally not a content-neutral basis for regulation that can be upheld under the First Amendment. *Id.*

In this case, these two principles collide. In a published decision, the Ninth Circuit has found that the ban on the heckler's veto overrides any concerns regarding the sanctity of the school environment. The Ninth Circuit has ruled that government cannot restrict speech based on listener reaction, even when the listeners are children in a school which is being disrupted by the speech:

> There is, however, no precedent for a "minors" exception to the prohibition on banning speech because of listeners' reaction to its content. It would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children. App. 17a, 18a.

This case raises important federal questions under the First and Fourth Amendments regarding the ability of school and law enforcement officials to prevent and control speech directed at middle school students when the speech causes a substantial disturbance. In its published opinion, the Ninth Circuit has created new law that is inconsistent with other relevant Supreme Court decisions by holding that speech cannot be limited at schools — even where

there is a substantial disruption — unless the disruption is caused by the **manner** of the speech. Petitioners submit that the Ninth Circuit's extension of the heckler's veto principles to school children creates dangerous precedent that must be addressed by this Court as it substantially limits the power of government to protect the school environment.

This case also raises an important federal question regarding the ability of law enforcement officers to investigate in situations where the application of the law to a particular circumstance is unclear. Even though the Ninth Circuit acknowledged that there was no case law to guide the officers in this case, and that the situation was "novel," the Ninth Circuit found that the deputies' request that their supervisor and the school administrator come to the scene to assist the deputies with their investigation of the disruption call unreasonably delayed the stop in violation of the Fourth Amendment. App. 18a, 31a, 36a. The court held that even though the law was unclear, an officer's uncertainty about the law could not serve as an excuse. App. 31a.

This ruling is inconsistent with established qualified immunity principles. The Ninth Circuit's decision allows no room for officers to investigate, no room for officers to seek clarification in justifiably unclear situations, and no room for reasonable error on the part of police officers. Where even the Ninth Circuit admits that the law was unclear, and that there was no case law to guide the officers, qualified immunity should shield the officers from liability for taking the time to investigate. To hold otherwise would

create dangerous precedent and will only serve to discourage police officers from doing their jobs.

LEGAL ARGUMENT

I. THE RIGHT OF GOVERNMENT TO MAINTAIN A PEACEFUL SCHOOL ENVIRONMENT NEEDS TO BE RECONCILED WITH THE BAN ON THE HECKLER'S VETO.

Initially, the Ninth Circuit held that this case involved a content-based heckler's veto. Petitioners do not concede that point, as will be discussed below. However, even if Petitioners' actions were content-based restrictions, they are justified under the First Amendment.

A. A "School Exception" to the Ban on the Heckler's Veto Is Consistent with this Court's Mandate Regarding First Amendment Rights In and Around Schools.

This Court has established that the school setting demands a special approach to First Amendment disputes. The First Amendment rights applicable to schools "are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood,* 484 U.S. at 266 (1988).

> A school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which

> might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order..."

Id. at 272. The nature of First Amendment rights within the schoolhouse gate is what is appropriate for children in school. *Vernonia Sch. Dist.47J v. Acton*, 515 U.S. 646, 656 (1995).

Historically, these principles arise in the context of student speech in schools. This case is unique in that it involves adult speech directed at a child audience in a school. There is scarce case law in this context and this case presents the Court with a much-needed opportunity to resolve the issue. Applying the law established by this Court regarding First Amendment rights in schools and the law established by this Court regarding speech directed at children, Petitioners submit that speech may be restricted at schools — whether the speech is made by adults or children — so long as the speech causes a substantial disruption to the school environment.

1. Government should not have to tolerate substantial disruption in schools — no matter what manner of speech creates it.

Government has the power to protect students from diversions which disturb the "peace and good order" of the school environment. See *Grayned v. City of Rockford* 408 U.S. 104, 119 (1972). The Ninth Circuit has held that schools have the **duty to prevent** disturbances. *Lavine v. Blaine School Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (no First Amendment violation when school expelled student for writing poem describing his shooting other students). Educators have substantial deference as to what speech is appropriate at schools. *Id.* at 988. "The daily administration of public education is committed to school officials...[t]hat responsibility carries with it the inherent authority to prescribe and control conduct in the schools." *Id.* citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

A "proper" educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be permissible in a non-school setting. See *Vernonia*, 515 U.S. at 655. For many purposes, school authorities "act *in loco parentis* ... with the 'power and indeed the duty to inculcate the habits and manners of civility.'" *Id.* at 656. Thus, while First Amendment rights are not shed at the schoolhouse gate, the nature of those rights is what is appropriate for children in school. *Id.* at 656. This duty exists under both federal and California law. See *M.W. v. Panama Buena Vista Union School Dist.*, 110 Cal.App.4th 508, 516-517 (2003) (special

relationship formed between school and students resulting in affirmative duty on school to take all reasonable steps to protect students)

This Court has established that schools should not have to tolerate speech which causes a "substantial disruption." Speech at schools may be suppressed when school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 511. In *Tinker*, the Court upheld the right of students to wear anti-war armbands as there was no evidence of a substantial disruption. *Id.* However, *Tinker* made clear that where such disruption exists, the school may act to stop the disturbance. *Id.*

This principle also extends to speech in the immediate vicinity of schools. In *Grayned v. City of Rockford*, 408 U.S. at 118-120, this Court held that speech may be limited in and around schools where it materially disrupts the classroom. *Id.* at 118. In *Grayned*, this Court upheld an anti-picketing and anti-noise ordinance that applied to areas in the immediate vicinity of schools. *Id.* at 118-119, n. 39. This Court logically reasoned that speech immediately around schools may have an effect in the school, and government must be empowered to prevent any such disturbance:

> [I]t would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. On the other hand, schools could hardly tolerate boisterous demonstrators who drown out

> classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. *Id.* at 119

This case presents that unusual situation where the trucks did cause a substantial disruption causing some middle school children to cry, some children to go home, and some children to plan a violent act directed at the trucks. Even assuming that the manner in which the speech was presented — a large truck with huge photographs — may not have been in and of itself disruptive, the disruption caused by the Plaintiffs to the children and to the school was real, material, and substantial.

The Ninth Circuit's ruling instructs schools and the police officers tasked with assisting schools that in these situations, they should not and cannot respond to the disruption — unless the **manner** of the speech is disruptive. This ruling is inconsistent with all of this Court's prior law establishing government's ability to stop substantial disruption at schools. Government should not have to tolerate substantial disruption at schools — no matter what manner of speech creates it.

2. Government can control speech at schools so long as the restrictions are reasonably related to legitimate pedagogical concerns.

In addition to preventing substantial disruptions, this Court has established that government is also empowered to control speech at schools so long as the restrictions are reasonably related to "legitimate pedagogical concerns." In *Bethel School Dist. No. 403*

v. Fraser, 478 U.S. 675, 682 (1986), this Court held that the school district was within its permissible authority when it suspended a high school student for using a graphic and sexual metaphor during an assembly. *Id.* This Court noted that school boards have the authority to determine what speech is appropriate for the classroom. *Id.* at 683.

Similarly, in *Hazelwood v. Kuhlmeier*, this Court found that a high school could restrict speech regarding sexual activity as the restriction was reasonably related to legitimate pedagogical concerns. *Hazelwood*, 484 U.S. at 273. Thus, the school's choice not to publish certain articles regarding student pregnancy and the impact of divorce in the high school newspaper did not violate the First Amendment as the restrictions were made out of legitimate concern for the students. *Id.*

Last year, this Court issued its most recent opinion on school speech in which it affirmed that schools can prohibit speech that can be perceived to advocate drug use. *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2622 (2007). In *Morse*, this Court held that a school administrator did not violate the First Amendment when she suspended a student after he refused to take down a banner stating "Bong Hits 4 Jesus" at an off-campus school event. *Id.*; see also *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (school can ban ads in school publications for Planned Parenthood).

In *Morse*, this Court noted that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or a "mere desire

to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Morse,* 127 S.Ct. at 2629. However, where the danger created by the speech is serious and palpable, the school may impose speech restrictions. *Id.*

Petitioners submit that the danger in this case was real and serious, and therefore justified the restriction. The Ninth Circuit does not even mention the *Morse* case in its opinion, but clearly, the effect of the Ninth Circuit's opinion will be that unless that real and serious danger is caused by the manner of the speech, the danger is irrelevant.

In this case, the evidence showed that the presence of the CBR vehicles caused some middle school children to not go to their classrooms and caused some children to become upset and cry. App. 6a, 7a, 43a. It caused several boys to become so outraged that they indicated they were going to get rocks from a construction area near the school to throw at the truck. App. 6a, 7a, 43a. The trucks also caused traffic disruption and concerns regarding the safety of the children arriving at school. App. 6a. Moreover, CBR's Executive Director has acknowledged that he has seen students "faint," "become physically ill," "weep," "avert their gaze," and leave the location in response to the photographs. App. 5a.

Where students, particularly young children, have this reaction to an event, government should be entitled to act out of a legitimate pedagogical concern. This is particularly true where children are a captive audience, as in this case. This discretion should not be

limited by whether the manner or the content of the speech causes the pedagogical problem.

3. Different First Amendment considerations apply to adult speech if the speech reaches an audience of children.

In addition to the special rules for schools, there are special First Amendment considerations when it comes to children audiences. This Court has acknowledged that First Amendment standards can be specially tailored to protect children. For example, in *United States v. American Library Association*, 539 U.S. 194, 199 (2003), this Court held that public libraries could use filtering software to block sexually explicit or otherwise problematic images that are "harmful" to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court also upheld a New York statute banning the sale of sexually oriented materials to minors.

The Ninth Circuit's ruling does not allow for any discretion related to the age of the audience. Petitioners acknowledge that CBR's display might not have caused a similar reaction at a high school, or perhaps even at a different middle school. However, in this case, CBR's display did in fact cause a substantial disruption to the school environment. Given the precedent for protecting both the school environment, and children audiences, government should be permitted to respond. As such, the Ninth Circuit's ruling is problematic and should not stand.

B. The Ninth Circuit's Focus on the Manner of the Speech as the Only Determinative Factor to Justify Speech Restrictions at Schools Is Impractical and Inconsistent with Legal Precedent.

The Ninth Circuit's focus on the manner of the speech as the determinative factor to justify speech restrictions is impractical and inconsistent with the legal precedent discussed above. For example, in terms of the manner of the speech, there is no real difference between the armband in *Tinker* and the paper containing the article in *Bethel* or the banner in *Morse*. See also *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (prohibiting student from wearing t-shirt condemning homosexuality did not violate First Amendment); *Scott v. School Bd.*, 324 F.3d 1246, 1248 (11th Cir. 2003) (ban on confederate flag upheld); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (removing homophobic materials from school bulletin board did not violate First Amendment because tolerance was legitimate pedagogical concern).

What is different, and significant, is the disturbance caused by these different speech media, and the administrators' perceived disruption to the school environment. In this case, the Ninth Circuit held that so long as the manner in which CBR expressed itself was not itself disruptive, the disruption caused by the display is simply irrelevant. However, Petitioners submit that under this Court's precedent, a substantial disruption is more significant than either the manner or the content of the speech. So long as there is substantial disruption at the school, government should be able to act.

School officials are in the best position to decide what speech is appropriate for its student population, and law enforcement officials should be entitled to rely on the representations made by school officials in assisting them in this endeavor. No one can dispute that the First Amendment applies in and around schools; however, where such speech substantially disrupts the school environment, government must be allowed to respond.

The test created by the Ninth Circuit in its ruling does not give government this discretion, and in fact, places government officials in an impossible situation. In the face of disruption, there is law saying that officials must act, no matter what the cause of the disruption may be. *Epperson*, 393 U.S. at 104; *Lavine*, 257 F.3d at 989. On the other hand, the Ninth Circuit's ruling says that unless the disruption is caused by the manner of speech, officials cannot act or they will face civil rights liability. This Court must provide guidance to schools and law enforcement.

Moreover, the Ninth Circuit's holding that officials may restrict speech only if the **manner** of speech causes a disturbance is wholly impractical. The Ninth Circuit held that CBR's display was constitutionally permissible — despite the substantial disruption caused — because the message was conveyed through silent photographs on a circling truck. However, under the Ninth Circuit's reasoning, if an individual on the same street by Dodson Middle School had been yelling or screaming, and the same exact disruption had resulted, officials could have lawfully stopped the disturbance and there would have been no First

Amendment violation. This distinction defies reason, and necessitates this Court's review.

C. Petitioners Imposed a Reasonable Time, Place, and Manner Restriction on CBR's Speech.

Instead, Petitioners imposed a reasonable time, place, and manner restriction on the Plaintiffs' speech. Like many other states, California recognizes a compelling interest in having an undisrupted school session, and in protecting students from diversions which disturb the "peace and good order" of the school environment. See *Rodriguez v. Inglewood Unified School Dist.*, 186 Cal.App.3d 707, 715 (1986); see also Cal. Const. art. I, § 28(c) (students have inalienable right to attend safe, secure, and peaceful campuses); Cal. Educ. Code § 32212 (advising schools to address the problem of classroom interruptions).

Consequently, California has enacted several statutes intended to protect schools and their students. See e.g. Educ. Code § 32210 (Willful Disturbance at Public School); Educ. Code § 32211 (Threatened Disruption or Interference With Classes); Educ. Code § 44810 (Willful Interference with Classroom Conduct); Educ. Code § 44811 (Disruption or Disorder); Penal Code § 626.7 (Failure to Obey Direction to Leave Campus); Penal Code § 626.8 (Disruptive Entry Upon School Grounds); Penal Code § 653g (Loitering Around School); Penal Code § 415.5 (Disturbances On Schools).

In this case, Kulas and Padberg were instructed not to return with the trucks or they might be cited with a violation of California Penal Code § 626.8. AER 12, 44-

47, 71, 102; App. 8a. Section 626.8 provides that it is a misdemeanor for a person without lawful business to remain on, or return to school property (or the public ways adjacent thereto) within 7 days of being informed by a school or law enforcement official that the person is causing a disturbance at the school. Kulas and Padberg were without lawful business as defined in section 626.8(c)(2) and were not engaged in a lawful exercise of free speech as they were causing a disturbance in violation of Education Code §§ 32210 and 44811.[3]

The Ninth Circuit held that because the manner in which the CBR Plaintiffs were exercising their First Amendment rights was not in and of itself disruptive, Penal Code § 626.8 could not have applied despite the actual disturbance created at Dodson Middle School because the disturbance was caused by the reaction to the speech. As discussed above, this distinction is not supported by the law or simple reason.

Government may impose content-neutral time, manner, and place restrictions on speech that serve a significant government interest, are narrowly tailored to advance that interest, and leave open alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In this case, the restriction on CBR's speech was a valid content-neutral time, place, and manner restriction. There was no evidence that Petitioners asked Kulas and Padberg to leave the school vicinity because of hostility toward

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[3] California Education Code §§ 32210 and 44811 make it a misdemeanor to willfully disturb and materially disrupt a school.

the content of the CBR message. The evidence showed that the deputies' actions were motivated solely by the disruption at the school. In fact, the CBR Plaintiffs admitted that they had been to several schools in Los Angeles County both before and after Dodson Middle School without incident. The restriction in this case was motivated only by the disturbance caused at Dodson.

Petitioners' actions were also lawful because they were done to serve a significant government interest. This Court has recognized a compelling government interest in having an undisrupted school session. *Grayned,* 408 U.S. at 119. In fact, government has few interests more compelling that its interest is insuring that children receive an adequate education. *PETA v. Rasmussen*, 298 F.3d 1198, 1205 (7th Cir. 2002).

Petitioners' restrictions were also narrowly tailored to advance this compelling interest, and left open alternate channels of communication. Kulas and Padberg were told only to leave the Dodson school area. They were not prohibited from driving their vehicles on other public streets around Dodson or from going to other schools. Petitioners' actions were reasonable time, place, and manner restrictions designed to stop a substantial disruption at Dodson. Should the Ninth Circuit's ruling stand, the ability of government officials to impose reasonable time, place, and manner restrictions designed to protect the sanctity of the school environment will be severely hindered. This Court should clarify what ability government has in these circumstances.

II. POLICE OFFICERS SHOULD BE ENTITLED TO QUALIFIED IMMUNITY FOR THE TIME INVESTIGATING WHEN EVEN THE CIRCUIT COURT OF APPEALS FINDS THAT THE LAW WAS UNCLEAR AND THAT THE CIRCUMSTANCES THE OFFICERS FACED WERE NOVEL.

This case also raises an important federal question under the Fourth Amendment. Despite its acknowledgment that there was no case law on Penal Code § 626.8 to guide the deputies, and that the circumstances presented to the deputies were "novel," the Ninth Circuit held that the deputies were liable under the Fourth Amendment. The court held that the deputies' uncertainty about the law in this situation could not excuse the 75-minute detention during which they sought the advice of their supervisor and the presence of a school administrator. App. 31a. This holding, given the circumstances presented in this case, radically deviates from established Fourth Amendment law and qualified immunity principles.

The critical goal of qualified immunity is to avoid excessive disruption of government. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). In our litigious culture, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court adopted a three-part inquiry to determine the

application of qualified immunity: (1) Did the officer's conduct violate a constitutional right? (2) Was that right clearly established? (3) And did the officer make a reasonable mistake regarding his/her conduct? *Id.* at 201-205.

Where a reasonable officer could not have known that his or her conduct was unlawful, the officer is entitled to qualified immunity. *Id.* at 202. Qualified immunity is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Fourth Amendment jurisprudence grants police officers a certain amount of leeway to conduct an investigation and recognizes that it takes officers time to do so. Case law imposes no rigid time limitations on investigative stops and there is no bright line for determining when an investigatory stop becomes an arrest. *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002), citing *Texas v. Brown*, 460 U.S. 730, 739 (1983). Evaluating the length of a detention requires consideration of all the circumstances surrounding the encounter, including how intrusive the stop was, and also whether the methods the police used were reasonable under the circumstances. *Id.*, citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991) "Common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

The Fourth Amendment does not require a police officer who lacks the precise information necessary for probable cause to arrest to simply shrug his/her

shoulders and allow a crime to occur or a criminal to escape. *Adams v. Williams*, 407 U.S. 143, 145 (1972). The whole point of an investigatory stop is to allow the police to investigate. *Gallegos*, 308 F.3d at 991-992.

A. Qualified Immunity Should Protect an Officer's Attempt to Investigate and Apply an Unclear Law.

In finding the deputies liable for the length of the detention in this case, the Ninth Circuit cited case law holding that uncertainty regarding the law cannot justify a detention. App. 31a. To hold otherwise, the court stated, would remove any incentive for officers to make certain that they understand the law. App. 31a. In situations where the law is clear, Petitioners might agree.

However, the situation in this case was not typical — by the Ninth Circuit's own admission. The Ninth Circuit acknowledged that there was no law to guide the deputies regarding the application of Penal Code § 626.8, and that there was no case law regarding whether the school's right to protect the students trumps the Plaintiffs' First Amendment rights. App. 26a, 27a.

While police officers are expected to know the law, officers are not required to have the kind of legal scholarship normally associated with law professors and academics. *Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986). Where the law is undeveloped, police officers cannot be expected to

predict the future course of constitutional law.[4] *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Instead, a "reasonable person" standard applies. *Ward*, 791 F.2d at 1332.

In this case, Petitioners submit that qualified immunity should be extended to officers who take the time to investigate situations where the law is unclear. The deputies should not have been held to knowledge which the Ninth Circuit determined that they reasonably did not have. The deputies were confronted with a novel situation. They sought assistance from their supervisor and clarification from the victim (the School). Their investigation was conducted in a manner that was minimally intrusive toward Kulas and Padberg. This is not the conduct of "plainly incompetent" officers, or officers who are knowingly violating the law. See *Malley*, 475 U.S. at 341. The deputies' conduct in this case was reasonable under the circumstances. It is patently unfair to subject the deputies to money damages for trying to do the right thing.

Indeed, to let the Ninth Circuit's ruling stand, would effectively discourage police officers from investigating, and creates dangerous precedent. The

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[4] Notably, it took the Ninth Circuit over a year from oral argument to issue its ruling in this matter. Oral argument in the Ninth Circuit took almost one hour, and oral argument in the district court was similar in time. It is indeed ironic that the Ninth Circuit faults the deputies for not knowing exactly what to do in the 75 minutes of this incident. The officers should not be punished for seeking their supervisor's and the school's assistance.

court's ruling allows no room for officers to investigate, no room for officers to seek clarification in justifiably unclear situations, and no room for reasonable error on the part of police officers. Where even the Ninth Circuit admits that the law was unclear, qualified immunity should shield the officers from liability for taking the time to investigate.

B. The Ninth Circuit's Ruling Contradicts its Own Precedent, and That of Other Circuits Regarding the Reasonable Length of a Detention.

Finally, the Ninth Circuit's holding is problematic in that it conflicts not only with its own precedent, but with the law in the other circuits regarding what is permissible for a detention. In *Gallegos v. City of Los Angeles*, 308 F.3d at 992, the Ninth Circuit held that a 45-60 minute detention was reasonable as a matter of law while the officers investigated the crime and waited for a supervisor to arrive to assist them with their investigation — especially since the suspects (as in this case) were neither handcuffed, nor in their patrol car the whole time. Similarly, the Ninth Circuit has acknowledged that reasonable investigations may require a need to consult with outside sources. *Id.; United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1995) (detention for over one hour was reasonable given need to confirm information with FAA and totality of circumstances); *United States v. Hodoyan-Palacios*, 993 F.Supp. 789, 792 (S.D. Cal. 1998) (detention lasting over two hours reasonable given need to obtain information from outside sources). In this case, the Ninth Circuit did not even acknowledge this cited precedent. At a minimum,

these cases could have given the deputies in this case reason to believe that their conduct was lawful under the qualified immunity analysis.

Moreover, the Ninth Circuit's ruling in this case creates a conflict with other circuits regarding the discretion afforded to officers to conduct investigations. See *United States v. McCarthy*, 77 F.3d 522 (1st Cir. 1996) (75 minute detention to conduct investigation reasonable where no evidence of less than diligent behavior of officers); *United States v. Frost*, 999 F.2d 737 (3d Cir. 1993) (90 minute detention to wait for dog for sniff test reasonable); *United States v. White*, 42 F.3d 457 (8th Cir. 1994) (80 minute detention to wait for dog for sniff test reasonable); *United States v. Rutherford*, 824 F.2d 831, 833-834 (10th Cir. 1987) (one-hour traffic stop reasonable where there were problems with police computer).

In *United States v. Sharpe*, 470 U.S. at 686-687, this Court noted:

> A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished ... The question is not simply whether some alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it.

In this case, the deputies acted reasonably and diligently under the circumstances they confronted. While Petitioners deny that a Fourth Amendment violation occurred — at a minimum, they should have

been entitled to qualified immunity for the length of their investigation under the Fourth Amendment given that even the Ninth Circuit itself admitted that the law was unclear.

Police officers are entitled to know what they are allowed to do in an investigation and what they can and cannot do when they face circumstances where the answers are not clear. The Ninth Circuit's ruling appears to require police officers to hold law degrees and crystal balls in order to avoid civil liability. Petitioners ask that this Court step in to clarify that this is not the case.

CONCLUSION

For the foregoing reasons, Respondents ask that this Court grant the instant petition for a writ of certiorari.

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Respectfully submitted,

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